



OFFICE OF THE ATTORNEY GENERAL OF TEXAS  
AUSTIN

GROVER SELLERS  
ATTORNEY GENERAL

Honorable Claude Isbell  
Secretary of State  
Austin, Texas

Attention: Honorable Horace B. Sessions  
Securities Commissioner

Dear Sir:

Opinion No. O-6437

Re: Whether the subscription to  
capital stock of the Wood Lake  
Water Corporation come within  
the purview of the Texas Secur-  
ity Act.

Your letter of March 1, 1945, requesting the opinion  
of this department on the question stated therein is as fol-  
lows:

"The Charter Division recently received a  
proposed charter for filing and approval, accom-  
panied by an affidavit showing the stock to have  
been subscribed by some thirty (30) persons. The  
matter was referred to the Securities Division of  
this office, and the organizers of the proposed  
corporation were advised through their attorney  
that unless a specific exemption under Section 3  
or 23 of the Texas Securities Act was available,  
compliance with the registration provisions of  
the Act would be necessary.

"The attorney contends that, since this is  
a community enterprise in which the subscribers  
voluntarily participated in subscribing for stock,  
the Texas Securities Act would have no applica-  
tion.

"Since to our knowledge this matter has not  
been the subject of Attorney General's opinion,  
and we have no Texas cases bearing on the subject,

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we shall appreciate your favoring us with an opinion on the question raised by the attorney for the incorporators.

"We attach hereto a copy of the proposed charter and affidavit, together with our complete correspondence file for your information in giving the matter consideration. We shall appreciate the return of this material."

The purpose clause of the Wood Lake Water Corporation as stated in the Articles of Incorporation is:

"The purpose for which the corporation is organized is to supply water to the public in the Wood Lake Community in Trinity County, Texas."

The amount of the stock is Three Thousand Dollars (\$3,000.00) divided into sixty (60) shares at Fifty Dollars (\$50.00) each, all of which capital stock has been in good faith subscribed and the sum of Two Thousand Two Hundred Dollars (\$2,200.00) paid in as per affidavit accompanying the charter. The amount paid in by the subscribers was paid by the sale, transfer and conveyance to the corporation of the property which was purchased from an agency of the United States government described in the affidavit accompanying the Articles of Incorporation. Generally speaking the charter of a private corporation cannot be filed unless the full amount of its authorized capital stock has been in good faith subscribed and fifty per cent (50%) thereof paid in cash, or its equivalent in other property or labor done. (Article 1308, Vernon's Annotated Civil Statutes). This provision refers in terms to the aggregate amount of capital stock. So long as the consideration received from some stockholders amounts to fifty per cent (50%) of the total amount of the capital stock, this prerequisite of incorporation is complied with. (Stringfellow v. Panhandle Packing Company, 213 S. W. 250.)

Subsections (a), (b) and (c) of Section 2, Article 600a, Vernon's Annotated Civil Statutes are as follows:

"(a) The term 'security' or 'securities' shall include any share, stock, treasury stock, stock certificate under a voting trust agreement, collateral trust certificate, equipment trust

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certificate, preorganization certificate or receipt, subscription or reorganization certificate, note, bond, debenture, mortgage certificate or other evidence of indebtedness, any form of commercial paper, certificate in or under a profit sharing or participation agreement, certificate or any instrument representing any interest in or under an oil, gas or mining lease, fee or title, or any certificate or instrument representing or secured by an interest in any or all of the capital, property, assets, profits or earnings of any company, investment contract, or any other instrument commonly known as a security, whether similar to those herein referred to or not.

"(b) The term 'company' shall include a corporation, a person, joint stock company, partnership, association, company, syndicate trust, incorporated or unincorporated, heretofore or hereafter formed under the laws of this or any other State, country, sovereignty or political subdivision thereof. As used herein, the term 'trust' shall be deemed to include a common law trust, but shall not include a trust created or appointed under or by virtue of a last will and testament or by a court of law and equity.

"(c) The term 'dealer' shall include every person or company, other than a salesman, who engages in this State, either for all or part of his or its time, directly or through an agent, in selling, offering for sale or delivery or soliciting subscriptions to, or orders for, or undertaking to dispose of, or to invite offers for, or dealing in any other manner in any security or securities within this State. Any issuer other than a registered dealer, of a security or securities who, directly or through any person or company, other than a registered dealer, offers for sale, sells or makes sales of its own security or securities shall be deemed a dealer and shall be required to comply with the provisions hereof; provided, however, this section or provisions shall not apply to such issuer if such security or securities are offered for sale or sold either to a

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registered dealer or only by or through a registered dealer acting as fiscal agent for the issuer; and provided further, this Section or provision shall not apply to such issuer if the transaction is within the exemptions contained in the provisions of Section 3 of this Act."

Section 3 of Article 600a, Vernon's Annotated Civil Statutes enumerates certain exempt transactions, and subsection (1) of said Section is as follows:

"(1) Subscriptions to capital stock necessary to qualify for incorporation when subscribed by not more than fifteen (15) incorporators in a proposed Texas corporation."

Under the definition of the term "security" or "securities" there is no question but the stock referred to is subject to the provisions of the Securities Act, unless exempt therefrom by some provision of the Act. The Texas Security Act requires the registration of all securities sold in Texas unless such securities come within a specific exemption from registration under Sections 3 and 23, and the Act also provides that persons making any offering and sale of securities be licensed as security dealers unless the securities are sold in exempt transactions listed under the exemptions provided under said sections above mentioned.

It will be noted that under Subsection (1), Section 3, supra, subscriptions to capital stock necessary to qualify for incorporation when subscribed by not more than fifteen (15) incorporators in a proposed Texas corporation are exempt from the provisions of the Securities Act. It has long been the departmental construction of the Secretary of State that if there were more than fifteen (15) subscribers to capital stock of a proposed Texas corporation the provisions of the Securities Act would be applicable, unless exempt by some provisions of the statute. The subscribers to capital stock are not necessarily the incorporators. The incorporators are the persons obtaining the charter. See 2 Words and Phrases, 1st Series, 1623. (Holliday v. Persons et al, 116 S. E. 907.)

It is stated in Hildebrand's Texas Corporations, Volume 1, page 447:

"The Texas statutes do not differentiate between 'stockholders' and 'subscribers' to the stock of the corporation. For instance in Vernon's Annotated Civil Statutes, Article 1308, it is provided that before the charter can be filed by the Secretary of State, the full amount of its capital stock must be subscribed by its stockholders. In Article

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1313 it is the stockholders that furnish evidence to the Secretary of State that the law has been complied with. According to Article 1326 the by-laws may be altered, changed or amended by a majority vote of the stockholders. Article 1328 provides that the books and records of the corporation shall be open to inspection of any stockholder. Article 1336 authorizes the forfeiture of the stock if any stockholder neglects to pay any installment as required by the Board of Directors, and Article 1345 authorizes an execution against any of the stockholders to an extent equal to the amount of the stock unpaid. On the other hand, Article 1335 provides that the Board of Directors may require 'the subscribers' to the capital stock to pay the amount subscribed as is provided in the by-laws. In other words, in most instances, a party who has subscribed for stock in a corporation on credit is designated as a stockholder even though he has not fully paid for his stock. Therefore, the statutes do not furnish a solution or much assistance in deciding the above problems. . ."

Subsection (e) of Section 2 of Article 600a, Vernon's Annotated Civil Statutes is as follows:

"The terms 'sale,' or 'offer for sale' or 'sell' shall include every disposition, or attempt to dispose of a security for value. The term 'sale' means and includes contracts and agreements whereby securities are sold, traded or exchanged for money, property or other thing of value, or any transfer or agreement to transfer, in trust or otherwise. Any security given or delivered with or as a bonus on account of, any purchase of securities or other thing of value, shall be conclusively presumed to constitute a part of the subject of such purchase and to have been sold for value. The term 'sell' means any act by which a sale is made, and the term 'sale' or 'offer for sale' shall include a subscription, an option for sale, a solicitation of sale, an attempt to sell, or an offer to sell, directly or by an agent or salesman, by a circular, letter or advertisement or otherwise, including the deposit in a United States Post

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Office or mail box or in any manner in the United States mails within this State of a letter, circular or other advertising matter; provided, however, that nothing herein shall limit or diminish the full meaning of the terms 'sale,' 'sell' or 'offer for sale' as used by or accepted in courts of law or equity. Provided, further, that the sale of a security under conditions which entitle the purchaser or subsequent holder to exchange the same for, or to purchase some other security shall not be deemed a sale or offer for sale of such other security; but no exchange for or sale of such other security shall ever be made unless and until the sale thereof shall have been first authorized in Texas under this Act, if not exempt hereunder, or by other provisions of law."

Section 5 of Article 600a is in part as follows:

"No dealer, agent or salesman shall sell or offer for sale any securities issued after the passage of this Act, except those which come within the classes enumerated in Subdivisions (a) to (q), both inclusive, of Section 3 of this Act, or Subdivisions (a) to (i), both inclusive of Section 23 of this Act, until the issuer of such securities shall have been granted a permit by the Secretary of State, and no such permit shall be granted by the Secretary of State until the issuer of such securities shall have filed with the Secretary of State a sworn statement verified under the oath of an executive officer of the issuer and attested by the secretary thereof, setting forth the following information: . . ."

The Articles of Incorporation of the Wood Lake Water Corporation disclose that there are three incorporators who have subscribed for a certain number of shares of stock and that there are a number of other persons who have subscribed for certain numbers of shares of stock and that such subscriptions which have been paid, as hereinabove stated, were paid in by the transfer of certain property to the corporation. Generally speaking stockholders are members of a corporation; however, they are not necessarily the incorporators. After carefully considering your question, we place the same construction on Subsection (1), Section 3 of Article 600a, Vernon's Annotated Civil Statutes as the

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Secretary of State, that is, if there are more than fifteen (15) subscribers to the capital stock, then the provisions of the Security Act are applicable. As there are more than fifteen (15) subscribers to the capital stock of the proposed corporation in question it is our opinion that the provisions of the Security Act are applicable and that the exemptions set forth in the Security Act are not available to the proposed corporation. Stated differently it will be necessary for one of the incorporators or sponsors acting for the incorporators to apply for and obtain a dealer's permit in order that the securities may be sold in compliance with the Texas Security Act. It is contended by the attorney for the incorporators that there has been no sale or will be no sale of stock. In view of the definition of the term "sale" contained in the Securities Act, we cannot agree with the contention of the attorney for the incorporators because the owners of certain property are transferring said property to the corporation for a certain number of shares of stock, the number of shares of stock to be received by each subscriber will be determined by the value of the property of each individual transferred to the corporation for said stock. We believe that such a transaction clearly comes within the definition of the term "sale" and, as heretofore stated, none of the exemptions contained in the Securities Act are applicable to the proposed corporation under the facts presented.

We are returning herewith the file accompanying your request.

Yours very truly

ATTORNEY GENERAL OF TEXAS

By *Ardell Williams*  
Ardell Williams  
Assistant

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